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# "Just a Bit Outside!": Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts

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# “Just a Bit Outside!”: Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts

Bernadette Bollas Genetin \*

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## I. INTRODUCTION

Federal discovery reform is yet again at the forefront of procedural debate. As has been said about personal jurisdiction, discovery “used to seem so easy.”<sup>1</sup> The original Federal Rules of

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1. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444 (1988); see also Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 30 (1994) (concluding that “[t]he idea behind discovery seemed simple” to Professor Sutherland, who wrote the first draft of the discovery provisions, and George Ragland, whose work on discovery was important to Sutherland; “[l]awyers

Civil Procedure, as adopted in 1938, were intended to minimize procedural default and promote resolution of cases on the merits.<sup>2</sup> The discovery rules had two oft-articulated goals—to assist in ascertaining the truth and to permit courts to do justice.<sup>3</sup> Pleading was deemphasized, requiring only notice to the opposing party of the conduct giving rise to the claim, with the majority of the sorting of strong and weak claims to occur in discovery.<sup>4</sup> The original discovery rules enabled these goals by allowing parties to obtain all relevant, non-privileged information before trial,<sup>5</sup> but little heed was paid to the costs that broad discovery might create.

The discovery provisions of the original Federal Rules played an important role in the federal courts' transition from trial by surprise—the so-called “sporting theory of justice”—to trial on the merits.<sup>6</sup> As some concluded, the advent of discovery allowed litigants in the federal courts to play their hands “with all the cards on the table.”<sup>7</sup>

Those that sought to limit discovery under the nascent Federal Rules claimed the Rules allowed fishing expeditions; however,

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wanted to ‘hide the ball,’” but effective litigation and resolution of cases required that parties share information).

2. See, e.g., Abraham E. Freedman, *Discovery as an Instrument of Justice*, 22 TEMP. L.Q. 174, 175 (1948); see also Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 88 (1997) (“The Federal Rule reformers wanted the complete story to come out in litigation.”).

3. Alexander Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 577–78 (1954).

4. *Id.*

5. FED. R. CIV. P. 26(b) (1970) (amended 1970) (deponents may be examined “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”). In 1970, Rule 26(b)(1) was amended to provide explicitly that this broad scope of discovery applied to all discovery devices. FED. R. CIV. P. 26(b)(1) (2010).

6. Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 115, 125 (1961); Holtzoff, *supra* note 3, at 576–79; Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059–60 (1955); Subrin, *supra* note 1, at 30.

7. Freedman, *supra* note 2, at 175; see also Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939) (noting that discovery would result in each party’s “lay[ing] all his cards upon the table, the important consideration [then] being who has the stronger hand, not who can play the cleverer game”).

courts and commentators alike concluded that discovery requests were not “‘fishing expedition[s],’ if there appear[ed] any reasonable possibility that there [might] be a fish in the pond.”<sup>8</sup> Broad discovery had become an essential element in the federal courts’ commitment to doing justice.

The civil litigation landscape has changed dramatically since the original Federal Rules were promulgated. Cases now vary widely in size and in kind.<sup>9</sup> Litigation and discovery strategies have changed, trials are rare,<sup>10</sup> and attorneys sometimes wonder if truth can be defined in the litigation context.<sup>11</sup> Even methods of creating, saving, and using information have changed, resulting in an avalanche of information that is available—in varying formats—for discovery. Moreover, there is disagreement about the extent of discovery costs: indeed, although it has been contended for decades that discovery costs have soared, empirical research has established that discovery costs are not “significant or disproportionate,” except

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8. Freedman, *supra* note 2, at 175; *accord* Holtzoff, *supra* note 3, at 577–78 (“fishing is permitted if there is a reasonable prospect of fish being caught”); Kaufman, *supra* note 6, at 115 (“[T]he federal rules authorize ‘fishing expeditions,’ so long as the fish may become bait with which to catch admissible evidence, and so long as certain rules to prevent outrageously unsportsmanlike conduct are not overstepped.”); *see also* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (discussing the historical development of discovery, particularly how facts uncovered by one party are subject to discovery from the opposing party).

9. *See, e.g.*, Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 601–02, 605–06 (2010) (offering a number of explanations for the increased amount and variety of cases on the federal docket); Richard Marcus, “Looking Backward” to 1938, 162 U. PA. L. REV. 1691, 1695–1707 (2014).

10. *See, e.g.*, Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.–C.L. L. REV. 399, 399–401 (2011) (narrating law firm’s shift from away from trial based advocacy).

11. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 744 (1998) (identifying, as a “conceptual flaw” in the outlook of the drafters of the original discovery rules, that they “treated facts as if they were a static, knowable item to be found[.] [with] discovery . . . compared to an x-ray that reveals the inner nature of the body,” while “contemporary scientific and literary notions invite one even to be suspicious that there are objective ‘facts’”).

in a small number of complex, high-stakes cases.<sup>12</sup> As it has become apparent, however, that federal discovery will not and perhaps should not provide for obtaining all relevant discovery in all cases, the debate focuses on appropriate methods for calibrating discovery.

The Advisory Committee on the Federal Rules of Civil Procedure (Advisory Committee) recently responded to renewed contentions that discovery is often disproportionate to the needs of cases filed in federal court in a manner consistent with rulemakers' responses since the early 1980s: by proposing amendments to the discovery rules<sup>13</sup> and judicial-case-management

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12. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012); see also Stephen B. Burbank, Sean Farhang, & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 658 (2013) (discussing how empirical research over the last 40 years has indicated that disproportionately expensive discovery is only a problem in a small slice of litigation—high stakes, complex cases) (citing Robert W. Gordon, *The Citizen Lawyer – A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1440–42 (1994); Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 151 (2012) (discussing how empirical studies since the 1960s have found that discovery is extensive and burdensome only in a small percentage of civil cases, and the possibility that in a majority of civil cases, no discovery takes place at all); Stephen N. Subrin, *The Limitations of Trans-substantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 392 (2010) (indicating that "[a]bout a half or a third of civil lawsuits (depending on the study) have no discovery, and the cases that utilize discovery frequently do not have more than two or three discovery incidents, perhaps a deposition or two and a set of interrogatories.").

13. The revisions include amendments to the following discovery provisions of the Federal Rules: (1) Rule 26(b)(1) (amending, *inter alia*, the "scope" of discovery to revise and relocate the so-called "proportionality" factors from Rule 26(b)(2)(C) to Rule 26(b)(1)); (2) Rule 26(c)(1)(B) (enlarging items that may be included in a protective order to include "allocation of expenses" or cost-shifting); (3) Rule 34 (specifying various changes when responding to discovery requests); (4) Rule 37(a)(3)(B)(iv) (providing rule-based authority for an order to compel production if "a party fails to produce documents" as requested); and (5) Rule 26(d)(2) (providing that parties may serve Rule 34 production requests before the Rule 26(f) meeting between the parties). See Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure on the Proposed Amendments to the Federal Rules of Civil Procedure, B-4 to B-11, B-30

provisions<sup>14</sup> of the Federal Rules of Civil Procedure. The 2015 Federal Rule amendments (2015 Rule Amendments) became law on December 1, 2015.<sup>15</sup> The 2015 Rule Amendments include multiple changes to the discovery and case management features of the Federal Rules: (1) promotion of earlier discovery, which is intended to permit more informed discussions between the parties at the Rule 26(f) conference and with the judge at the initial case management conference, and to facilitate earlier judicial case management;<sup>16</sup> (2) encouragement of direct communication between judges and attorneys;<sup>17</sup> (3) encouragement of greater cooperation by parties in achieving Rule 1's goals of "just, speedy, and inexpensive

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to B-36 (June 14, 2014) (*available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>) [hereinafter Judge Campbell Memorandum].

14. Rule 16 was amended to: (1) to encourage case management conferences with direct exchanges between the parties and the judge; (2) to move forward the time for the initial case management conference to 90 days after any defendant has been served or 60 days after any defendant has appeared, absent good cause for a later case management conference; (3) to add preservation of electronically stored information and discussion of potential agreements under Fed. R. Evid. 502 to the list of items that may be included in a case management order; and (4) to include in the list of items for discussion at an initial case management conference the issue of whether parties should be required to confer with the court before filing discovery motions. FED. R. CIV. P. 16. Amendments to Rule 4(m) reduce the time for serving the summons and complaint and to Rule 1 encourage cooperation among parties during litigation. FED. R. CIV. P. 4; *see* Judge Campbell Memorandum, *supra* note 13, at B-11 to B-13, B-21 to B-29 (discussing proposed changes to the Federal Rules of Civil Procedure that emphasize that the initial case management meeting may be conducted by any means of direct simultaneous communication; change the time for holding scheduling conferences from 120 days to 90 days or 60 days after the defendant has appeared; and change the time limit for serving the summons and complaints from 120 days to 90 days).

15. The Supreme Court sent notices of its adoption of the amendments to Congress on April 29, 2015. Order Amending the Federal Rules of Civil Procedure, 575 U.S. \_\_\_ (2015). *See* 28 U.S.C. § 2074(a) (1988).

16. FED. R. CIV. P. 26(f); *see* Judge Campbell Memorandum, *supra* note 13, at B-11 to B-13.

17. FED. R. CIV. P. 16; *see* Judge Campbell Memorandum, *supra* note 13, at B-12.

resolution of every action”;<sup>18</sup> and (4) facilitation of greater proportionality between the needs of a case and the permissible extent of discovery through amendments to the scope-of-discovery provision in Rule 26(b)(1).<sup>19</sup>

This Article focuses primarily on the fourth aspect of the 2015 Rule Amendments—the requirement that the parties or judges make a “proportionality” analysis in each case to determine the scope of permissible discovery. Amended Rule 26(b)(1) authorizes parties to obtain discovery regarding “any non-privileged matter that is relevant to any party’s claim or defense,” if that matter is also “proportional to the needs of the case,” based on the following factors: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the discovery outweighs its likely benefit.”<sup>20</sup> This amendment, combined with other amendments to Rule 26(b)(1), completes the move in the federal courts from a default philosophy of broad and liberal discovery to a landscape in which there is no default or guiding principle, other than an open-ended appeal to proportionality.<sup>21</sup> The 2015 version of Rule 26(b)(1) requires

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18. FED. R. CIV. P. 1. Rule 1 previously provided that the rules should “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1 (2014). Rule 1 now provides that “[the rules should] be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1. The Committee Note regarding Rule 1 indicates that the changes are intended to encourage lawyers and parties to cooperate to achieve the goals of a “just, speedy, and inexpensive” resolution of actions. Judge Campbell Memorandum, *supra* note 13, at B-13. *See generally* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 297 (2010) (concluding that Fed. R. Civ. P. 1’s principle of achieving the “just, speedy, and inexpensive” resolution of cases provided meaningful guidance when considered in the context of the goals and beliefs of the original federal rulemakers, but that, in the modern litigation landscape, the potentially conflicting goals of “just,” “speedy,” and “inexpensive” litigation require trade-offs that the rule makers should address directly).

19. FED. R. CIV. P. 26(b)(1); *see* Judge Campbell Memorandum, *supra* note 13, at B-4 to B-5.

20. FED. R. CIV. P. 26(b)(1); *see* Judge Campbell Memorandum, *supra* note 13, at B-30.

21. *See generally* Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012

unelected federal court judges to make unguided policy decisions that directly impact the winners and losers of the substantive claims before them. Rule 26(b)(1) promotes proportionality but lacks the normative guideposts that could instruct a judge's proportionality decisions, defaulting instead to a balancing-of-factors process that requires parties or judges to balance various relevant factors but that provides minimal guidance on the priority among factors or the weight to be accorded to the factors.

I conclude that the policymaking required of judges to determine the permissible scope of discovery under the proportionality standard is at the boundaries of the institutional competence of the federal courts, at variance with the separation-of-powers instinct and requirement of the Rules Enabling Act,<sup>22</sup> and may decrease the deference due to substantive state law under the *Erie* doctrine.<sup>23</sup> The new proportionality standard<sup>24</sup> permits and requires

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MICH. ST. L. REV. 933, 975 (2012) (suggesting that federal rulemakers adopt proportionality limits on the scope of discovery and that the proportionality provision adopted in the Utah Civil Procedure Rules would provide a useful pattern); Gordon W.etzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. U. L. REV. 513, 513, 528–32 (2010) (advocating the elimination of the default of “broad and liberal” discovery and replacing it with a “principle” of “proportionality”). *But see* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990–96, 2016 (2007) (concluding that, when rulemakers delegate discretion to judges to make procedural choices by balancing listed factors, the result may be an “ad hoc weighing that lacks meaningful constraint and jeopardizes principled consistency over the system as a whole,” unless the rulemakers also provide clear guiding principles); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1222, 1228 (2013) (acknowledging that federal courts have institutional limitations that prevent them from being able to, in particular cases, make a contextualized cost-benefit analysis, measure results of applying a substance-specific rule, evaluate normatively resulting data, or estimate the probable results of applying substance-specific rules).

22. 28 U.S.C. §§ 2072–2074 (2014); *see* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700–01 (1988).

23. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

24. Recognizing that “proportionality” factors have been included in the Federal Rules of Civil Procedure since 1983, I, nevertheless, occasionally refer to the proportionality balance required of parties and judges under Rule 26(b)(1) as “new”. This is because the new positioning of the proportionality balancing factors



judges to set different boundaries for different types of substantive claims in individual cases. It thus requires judges to make normative choices about the scope of discovery, based on the necessarily incomplete information that will be available in the confines of federal court litigation. Moving far from the neutral umpire analogy in which a judge calls balls and strikes based on a standard strike zone,<sup>25</sup> the proportionality amendment to Rule 26(b)(1) essentially permits and requires judges to create different discovery strike zones for each batter—sometimes making the strike zone narrower than home plate and sometimes constricting the height of the standard strike zone—before ruling on balls and strikes. It, moreover, requires judges to narrow the permissible discovery zone based on relative concepts of “proportionality” that provide minimal normative guidance and based on insufficient information.<sup>26</sup> My call? “Just a bit outside”<sup>27</sup> the institutional capacity and role of federal judges—even for judges who

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as part of the definition of discoverable matter, rather than as a limitation on otherwise discoverable information, will in all likelihood result in that balance playing a new and critical role in determining the extent of discovery. *See* Marcus, *supra* note 9, at 1717 (discussing the increase in attention paid to proportionality, and tracing it to rule changes and the difficulty of application); *see also* Bernadette Bollas Genetin, *Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1120 (2010) (observing, with respect to Rule 56 regarding summary judgment, that when the text of the Rule provides a limitation, judges take heed).

25. Major League Baseball defines its standard strike zone as “that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap.” [http://mlb.mlb.com/mlb/official\\_info/umpires/rules\\_interest.jsp](http://mlb.mlb.com/mlb/official_info/umpires/rules_interest.jsp). *See, e.g.*, Bone, *supra* note 21, at 1972–73 (noting that the “dominant paradigm of party-controlled litigation . . . envisioned a fairly limited role for the trial judge as detached and neutral umpire and thus a limited domain over which judicial discretion would operate”). *But see* Freedman, *supra* note 2, at 181 (federal trial judge was not to play the role of the neutral umpire, but was given latitude to do justice in individual cases).

26. Bone, *supra* note 21, at 1990–96 (describing problems of information access that hamper federal judges in attempts to create case-specific procedure); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 917–18, 926–30 (1999); Marcus, *supra* note 21, at 1230–31; Singer, *supra* note 12, at 183. *See also* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon*, 34 FLA. ST. L. REV. 1025, 1045 (2007) (noting that the appellate courts, rather than district courts, are charged with norm declaration or norm elaboration).

27. MAJOR LEAGUE (Paramount Pictures 1989).

have been granted a wide measure of discretion under the Federal Rules.<sup>28</sup>

In Section II, this Article briefly examines the evolution of the discovery rules since their adoption in 1938. In Section III, the Article discusses the 2015 amendments to Rule 26(b)(1) and, in particular, the relocation of the proportionality balancing factors to operate as part of the definition of discoverable information under Rule 26(b)(1). It also reviews other discovery-limiting amendments to Rule 26(b)(1). Section IV then explores the institutional limitations of the federal courts, concluding that the proportionality amendment to Rule 26(b)(1) asks judges to assume a role that is at odds with the federal courts' institutional competence and requires decision making that may often exceed the federal judges' normative lawmaking authority. In Section IV, the Article also considers that the way forward may be along a path that requires both (1) judicial decision making that acknowledges the values embedded in existing law; and (2) additional rulemaking that provides greater guidance regarding proportionality. First, in making decisions regarding proportionate discovery, judges should further the normative preferences of Congress and other lawmakers in cases involving favored statutory claims<sup>29</sup> and should also promote rights otherwise recognized in the substantive law.<sup>30</sup>

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28. *E.g.*, Bone, *supra* note 21, at 1962, 1967 (concluding that “[c]ase-specific discretion has been at the heart of the Federal Rules ever since they were first adopted in 1938”); *see also id.* at 1968–70 (observing that the Federal Rules include both explicit delegations of “broad discretion” and “vague language inviting case-specific interpretation”); Subrin, *supra* note 1, at 35–36; Subrin, *supra* note 12, at 377, 382, 391.

29. *See* Subrin, *supra* note 12, at 400 (discussing Congress’s preference for energetic enforcement of some statutes “by providing for multiple damages or fee shifting for successful plaintiffs”); *see also* Burbank & Subrin, *supra* note 10, at 405–06, 411 (discussing Congress’s use of private enforcement actions to aid in enforcement of important social goals and recommending that such actions be exempted from any “simple track” procedural options which provide for lesser discovery).

30. *See* Burbank, Farhang & Kritzer, *supra* note 12, at 644, 646–48 (discussing the federal government’s increasing reliance on private enforcement in both statutory and administrative law in four different periods—during and after the Civil War; “during the Progressive Era, [bridging] the nineteenth and twentieth centuries;” “during the Great Depression in the 1930s;” and “following the Civil Rights and ‘Great Society’ period in the 1960s”—and suggesting that judicial action,

Second, judges should articulate the rationale underlying their proportionality decisions to, among other things, promote development of the law regarding proportionality in discovery; enhance appellate review of proportionality decisions; and provide the necessary flexibility in proportionality decisions, while revealing the extent of court adherence to normative preferences of Congress and other lawmakers. Finally, the rulemakers should achieve the goal of proportionality by providing greater instruction regarding application of the proportionality factors or by creating a general set of discovery procedures for most cases and supplementing the general procedure with substance-specific protocols for selected substantive claims that exhibit recurring discovery problems.<sup>31</sup>

## II. A SHORT HISTORY OF THE FEDERAL DISCOVERY RULES

The original discovery rules were promulgated as part of a procedural system whose drafters wanted the complete story of the litigation to be told. The optimal procedural system, they believed, should ensure that the party deserving to prevail on the merits would prevail, whether the dispute was resolved through trial, settlement, or

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including some case management tools, could “subvert the policy preferences of the enacting Congress”); *see also* Marcus, *supra* note 21, at 1228–30 (noting that courts, when creating substance-specific process law rather than following a general, trans-substantive rule of procedure, tend to resort to their own normative policy preferences that may clash with existing preferences of Congress or that are, in any event, “better left to coordinate branches”); Subrin, *supra* note 12, at 400.

31. *E.g.*, Burbank, *supra* note 22, at 716–18; Burbank & Subrin, *supra* note 10, at 409–10, 412; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547–48 (1986); Subrin, *supra* note 1, at 28–29, 45–56; Subrin, *supra* note 12, at 399–405; *see also* Stephen S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 650–51, 654–57 (2014) (supporting the proportionality balancing, but suggesting that it should be complimented by “scheme-based reform efforts”); Singer, *supra* note 12, at 200–02. In fact, while working on the 2015 Rule Amendments, the Advisory Committee worked with the National Employment Lawyers Association and the Institute for Advancement of the American Legal System to create discovery protocols for use in employment cases alleging adverse action. Gensler & Rosenthal, *supra*, at 654–55; *see also* Judge Campbell Memorandum, *supra* note 13, at B-3 (discussing that these protocols “include substantial mandatory disclosures required of both sides at the beginning of employment cases”).

otherwise.<sup>32</sup> The original federal rulemakers, however, also aspired to create a procedural system that was simple, uniform, and flexible enough to apply to all cases, both legal and equitable.<sup>33</sup> A byproduct of these goals was the generality and trans-substantivity of the resulting Federal Rules.<sup>34</sup>

To minimize technical default and, at the same time, facilitate the resolution of cases on the merits, the original federal rulemakers drafted rules that simplified pleading; established broad, party-managed discovery; promoted liberal joinder of claims and parties; and encouraged trial on the merits with the full facts.<sup>35</sup> Indeed, the watchwords of the original federal rulemakers were “generosity” and “liberality,”<sup>36</sup> which they achieved (in large measure) by giving discretion to judges.<sup>37</sup>

The discovery rules, acknowledged by the rulemakers as “revolutionary,” were an important element of the bold new procedural system.<sup>38</sup> Discovery would provide justice to those who lacked evidence, permit parties to uncover the truth, and provide for

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32. Subrin, *supra* note 2, at 88; Subrin, *supra* note 1, at 35.

33. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1019, 1025–26 (1982); Bone, *supra* note 21, at 1971–72; Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 690 (2002); Subrin, *supra* note 12, at 382.

34. Subrin, *supra* note 12, at 383, 385.

35. Subrin, *supra* note 1, at 30–32.

36. The rules made “generous and liberal provisions” for counterclaims and cross claims; included a “liberal provision” regarding third-party practice; contained, in Rule 16, “a device with magnificent potentialities” that would permit the judge to “control[] the subsequent course of the action;” included, in Rule 18, a joinder of claims provision that was “especially liberal;” and established “generous” rules relating to depositions and discovery that could be termed “revolutionary.” Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 267–71, 275, 279 (1939).

37. Bone, *supra* note 21, at 1967–70.

38. Dobie, *supra* note 38, at 275; *see also* Sunderland, *supra* note 7, at 738–39 (noting that the original discovery rules permitted parties to seek “almost unlimited discovery” and that, combined with pretrial innovations in the original Federal Rules, “[t]hey mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial”).

resolution of controversies on the merits.<sup>39</sup> Professor Stephen Subrin has chronicled the narrowly circumscribed access to discovery in American and British courts before the promulgation of the original Federal Rules.<sup>40</sup> He notes that Edson R. Sunderland, the principal drafter of the discovery provisions of the original Federal Rules, drew from discovery tools available in various states and ultimately incorporated in the Federal Rules an amalgam of virtually every type of discovery provision, often discarding constraints that limited a particular discovery device.<sup>41</sup> The resulting Rules included an impressive array of discovery devices that were much broader in scope than any existing state procedural system and were fully equipped to meet the goal of uncovering the truth and facilitating resolution of cases on the merits.<sup>42</sup>

The liberal discovery provisions of the original Federal Rules, thus, exhibited the normative goal of achieving correct substantive outcomes as well as the trans-substantive nature of the Federal Rules. The discovery rules applied to all cases, regardless of subject matter or case size, by relying on highly generalized rules that remitted many procedural issues to the discretion of judges in individual cases.<sup>43</sup> The trans-substantive premise that discovery could be had regarding “any matter, not privileged, which [was] relevant to the subject matter involved in the pending action,”<sup>44</sup> paralleled the general purpose of the Federal Rules to enable the deserving party to prevail in the case.

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39. Freedman, *supra* note 2, at 175; Subrin, *supra* note 11, at 716 (enumerating the benefits claimed for broad discovery, which include: “elimination of surprise; preserving testimony so it will be available in case of the death or other unavailability of a witness; diminishing the importance of pleadings; increasing ‘the effectiveness of the summary judgment’; focusing the trial on ‘the main points in controversy’; and permitting each side to assess the strengths and weaknesses of their cases in advance, frequently making trials unnecessary because of informed settlement” (quoting Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. OF POL. & SOC. SCI. 60, 74–75 (1933))).

40. Subrin, *supra* note 11, at 694, 698–705.

41. *Id.* at 714–19; Subrin, *supra* note 1, at 30–33.

42. Subrin, *supra* note 11, at 719.

43. Bone, *supra* note 21, at 1972; Stephen B. Burbank, *The Costs of Complexity—Complex Litigation: Cases and Materials on Advanced Civil Procedure*, 85 MICH. L. REV. 1463, 1473–74 (1987); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1613 (2014).

44. FED. R. CIV. P. 26(b) (1970) (amended 1970) (providing scope of discovery for depositions).

It also gave clear direction to district courts—judges were to enforce broad discovery in all cases. The original federal rulemakers, therefore, made the normative decision that courts were to provide broad and liberal discovery sufficient to permit the uncovering of all relevant, non-privileged information.

Broad discovery, moreover, gave primary emphasis to enforcing the substantive goals of the governing law.<sup>45</sup> In some cases, the commitment to broad discovery increased the cost or length of the case, but the original rulemakers apparently accepted such consequences as appropriate costs of enhancing just outcomes.<sup>46</sup> They probably also thought that cases would remain relatively small, thus limiting discovery costs.<sup>47</sup> Notwithstanding a subsequent growth in types and sizes of cases, the procedural system created under the original Federal Rules, including its provision for liberal discovery, worked relatively well through the 1970s.<sup>48</sup>

Increased litigation in the 1970s, largely based on use of the statutory private enforcement provisions created by Congress and class-action lawsuits made possible by the 1966 revisions to Rule 23, however, resulted in calls to address the rising numbers of cases and the supposedly excessive litigation costs.<sup>49</sup> In response, in 1976, Chief Justice Burger convened the Pound Conference, titled, “Causes of Popular Dissatisfaction with the Administration of Justice,” which focused on overcrowded courts, excessive litigation, and the costs and delays of litigation.<sup>50</sup> The conference was a critical element of what would later be referred to as the “counterrevolution of the late

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45. See Bone, *supra* note 21, at 1981 (indicating that the “primary goal of procedure is to produce outcomes that enforce the substantive law properly”).

46. See Bone, *supra* note 18, at 293 n.26 (discussing that the original rulemakers might not have foreseen the broad discovery associated with complex litigation and may have been content with expanding discovery because they thought it would reduce costs by encouraging settlement).

47. *Id.*

48. See Burbank & Farhang, *supra* note 45, at 1586–87 (noting that the statutory private enforcement provisions and the broadened class action rule of 1966 led to increased litigation).

49. *Id.* at 1547, 1587–48, 1587–88; Carrington, *supra* note 9, at 601–02, 605–06.

50. Reda, *supra* note 12, at 1091–92.

[t]wentieth [c]entury's discovery reform movements."<sup>51</sup> The 1970s had brought claims of excessive litigation and discovery abuse, and, as a consequence, the liberal discovery principle of the original Federal Rules came under attack.<sup>52</sup> The Pound Conference produced a number of recommendations for improving litigation and provided them to the "Pound Conference Follow-Up Task Force" for further refinement.<sup>53</sup> The Follow-Up Task Force made recommendations that would introduce "fundamental changes" into the justice system, including recommendations to improve judicial case management and restrict discovery in order to address the perceived problems of excessive litigation costs and discovery abuse.<sup>54</sup>

Empirical evidence consistently establishing that discovery costs were not excessive, except in a small group of complex, high-stakes cases,<sup>55</sup> did not dispel the notions of excessive discovery costs. Thus, from the 1980s to the present, calls for litigation and discovery reform spurred successive Federal Rule amendments aimed at broadening judicial case management authority and restricting discovery. In 1983, for instance, Rule 26(b)(1) was amended to add the first "proportionality" limitations on discoverable information to the Federal Rules. The proportionality factors were not included in the definition of discoverable material, which continued to provide that parties could obtain discovery "regarding any matter, not

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51. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 537–38 (2001).

52. *Id.* at 542–43.

53. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 279–80, 288–90 (1977).

54. Reda, *supra* note 12, at 1094 (citing AM. BAR ASS'N, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE (1976), *reprinted in* 74 F.R.D. 159, 191 (1976)).

55. See, e.g., John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 552 (2000) ("Discovery problems were . . . much more likely to be reported in cases with higher stakes. . . . Where a lot of money is at stake, where the issues involve personal injury or matters of principle, where the relationships are contentious and the issues complex, here we see more discovery and more problems with discovery.") (quoting THOMAS E. WILLGING ET AL., FEDERAL PROPOSALS FOR CHANGE: A CASE BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 21 (1997)); Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 75–76 (2001); Reda, *supra* note 12, at 1088–90.

privileged, which is relevant to the subject matter involved in the pending action.”<sup>56</sup> Instead, the proportionality factors were included in a subsequent paragraph that permitted courts to limit the “frequency or use of discovery methods” if it determined that certain discovery-limiting principles had been established.<sup>57</sup>

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act on its own initiative after reasonable notice or pursuant to a motion under subdivision (c).<sup>58</sup>

Though these restricting principles permitted both increased judicial discretion to manage cases and broader authority to limit discovery, the provisions were rarely used. Commentators have attributed the ineffectiveness of the proportionality factors to parties’

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56. FED. R. CIV. P. 26(b)(1) (amended 1993).

57. *Id.*

58. *Id.* The 1983 amendments also added Rule 28(g), which provided that an attorney’s signature on discovery requests, responses, and objections constituted various certifications regarding the discovery, some of which paralleled the new proportionality limitations, and which also provided sanctions for violations of the certifications. *Id.*



strategic reluctance to involve judges in discovery issues, the inability of parties to convey complete information to judges about discovery disputes, and the complexity of the proportionality factors, as well as to insufficient information about the merits of the case at the time of discovery.<sup>59</sup> Additional changes seeking to curb discovery and litigation expenses were implemented in 1993. For the purposes of this Article, the most relevant change was the moving of the proportionality limitations from their location in Rule 26(b)(1) to Rule 26(b)(2).<sup>60</sup>

In 2000, additional discovery amendments narrowed the scope-of-discovery provision of Rule 26(b)(1). This time, the narrowing was based on a proposal originally put forth by the American College of Trial Lawyers in 1977 and subsequently renewed by the American Bar Association Section on Litigation.<sup>61</sup> Under this amendment, the scope of discovery that parties could obtain without a court order was reduced from all non-privileged matter relevant to the “subject matter involved in the action,” to all information relevant to “any party’s claim or defense.”<sup>62</sup> Under the amendment, parties could still obtain information relevant to the “subject matter” of the action, but only on motion and a showing of “good cause.”<sup>63</sup> This amendment, like other discovery amendments

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59. See e.g., Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 905, 911–26 (2009) (concluding that proportionality balancing has not worked well because the balance requires information about the merits of the case, which is not available at the time that the judge makes discovery decisions and which also cannot be communicated well to the judge); Singer, *supra* note 12, at 147–48, 180–86 (concluding that proportionality limits on discovery have been ineffective because of the parties’ strategic reluctance to submit discovery issues to judges; the “unavoidable information gap” that arises from the parties’ inability to convey complete information about discovery disputes to judges; and the complexity of the proportionality factors).

60. FED. R. CIV. P. 26(b)(2). Other changes included the addition of initial disclosures to Rule 26(a)(1) and the inclusion of presumptive limits on interrogatories and depositions. FED. R. CIV. P. 26(a)(1); FED. R. CIV. P. 34(a); FED. R. CIV. P. 30(a).

61. Thomas D. Rowe, Jr., *A Square Peg in a Round Hole?: The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 15 & n.12 (2001).

62. FED. R. CIV. P. 26(b)(1) (2010) (amended 2010).

63. *Id.*

since 1983, sought to rein in discovery costs and provide greater judicial supervision of discovery.<sup>64</sup>

Section III completes this review of the evolution of the discovery rules by examining the 2015 amendments to Rule 26(b)(1), which introduce proportionality balancing as part of the definition of the scope of discovery and implement other changes that appear to limit the scope of available discovery.

### III. CASE-SPECIFIC DECISIONS ON PROPORTIONALITY TAKE CENTER STAGE

The 2015 Rule Amendments reveal the continued commitment of the Advisory Committee to proportional discovery and early, active judicial management of cases.<sup>65</sup> A primary component of this commitment is the amendment's relocation of the existing proportionality factors from Rule 26(b)(2)(C)(iii) to the scope-of-discovery provision in Rule 26(b)(1).<sup>66</sup> In a memorandum explaining the proposals to return the proportionality factors to Rule 26(b)(1), Judge David G. Campbell, Chair of the Advisory Committee on the Rules of Civil Procedure, underscored that reasonable and proportionate discovery has been a goal under the Federal Rules for over thirty years.<sup>67</sup> Indeed, Judge Campbell emphasized that “three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee—that

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64. Rowe, *supra* note 64, at 16. *See also id.* at 20–21, 24–27, 29–30 (concluding, based on then-available decisions, that discovery had not been diminished appreciably by Rule amendments precluding “subject matter” discovery absent a motion and showing of good cause because, among other things, of the parties’ ability to plead claims and defenses on information and belief; court reliance on material in the Committee Note that seemed to permit borderline issues to be characterized as relevant to a claim or defense; the courts’ continuing reliance on general principles of broad and liberal discovery; and the courts’ reliance on the provision of Rule 26(b)(1) that permitted discovery of information “reasonably calculated to lead to discovery of admissible evidence”).

65. Judge Campbell Memorandum, *supra* note 13, at B-4 to B-6.

66. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-7 to B-8.

67. Judge Campbell Memorandum, *supra* note 13, at B-6.

proportionality is an important and necessary feature of civil litigation in federal courts.”<sup>68</sup> In the 2015 Rule Amendments, the advisory committee pursued the goal of proportionality by installing the proportionality factors as “an explicit component of the scope of discovery, [thus,] requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes.”<sup>69</sup>

In this Part, I acknowledge the importance of discovery that is proportional to the needs of a case. I conclude, however, that the 2015 Rule Amendments remove the default of liberal discovery, and fail to replace it with a guiding touchstone or clear principle for parties to reference when negotiating discovery boundaries or for judges to consider in making proportionality decisions.<sup>70</sup> Rule 26(b)(1) thus seeks to achieve discovery proportionate to the needs of each case by permitting case-specific balancing. In doing so, however, it sacrifices the use of either a trans-substantive background principle or a set of guiding principles that could provide direction to parties negotiating the extent of discovery and to judges making proportionality decisions and which could also counterbalance the federal courts’ institutional limitations when required to craft case-specific procedures.<sup>71</sup> In Part

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68. Judge Campbell Memorandum, *supra* note 13, at B-8.

69. *Id.*

70. Although I concentrate primarily on the incompatibility of the balancing test with the institutional competence of federal court judges, I note as well that the absence of a normative decision, or set of decisions, by the Advisory Committee establishing a default or a set of guidelines for making the proportionality calculation, means that parties, who will also be in the trenches in determining the proportionality issue, have no baseline for negotiating the scope of discovery. *See, e.g.,* Subrin, *supra* note 2, at 89–90, 94 (discussing the importance to parties of predictability of discovery); Singer, *supra* note 12, at 181–84 (defining predictability as a core value of civil litigation). Likewise, Professor Bone has concluded that Rule 1, which is “meant to guide [the trial judge’s] discretion in socially productive ways,” has today become vague and misleading because it fails to make the value choices that could provide guidance to judges regarding whether and when to pursue the conflicting goals of just outcomes, speed, and inexpensive litigation. Bone, *supra* note 18, at 288–89, 292–97.

71. Marcus, *supra* note 21, at 1195, 1228–33 (recognizing that trans-substantive procedural rules provide a means of counterbalancing the institutional limitations of the federal courts, including limitation of lawmaking authority, competence (including the ability to obtain complete information and evaluate it empirically), and uniformity); *see also* Burbank, *supra* note 45, at 1473–76 (noting that the case-specific approach encompassed in the new trend for the rules of procedure does not produce a higher likelihood that the party’s substantive rights

III(A), I discuss the amendment to insert case-specific balancing of proportionality factors as the primary determinant of the scope of discovery, and in Part III(B), I discuss other changes to Rule 26(b)(1) that narrow discovery.

*A. Proportionality Returns to Rule 26(b)(1)*

The Advisory Committee correctly highlights that proportionality in discovery has been pursued by federal rulemakers in three previous decades.<sup>72</sup> The Committee Note, however, spends more time establishing that using proportionality factors to define the scope of discovery is not new, than it spends justifying the appropriateness of limiting discovery scope through case-specific balancing of multiple factors.<sup>73</sup> In Part III(A)(1), I discuss the Advisory Committee's purpose for relocating the proportionality standard to Rule 26(b)(1). In Part III(A)(2), I focus on the textual changes and the explanatory material regarding proportionality in the Committee Note.

1. Proportionality in Discovery:  
1983 to the Present

The Committee Note points out that in 1983, federal rulemakers added the proportionality factors to Rule 26(b)(1), which ultimately came to be referred to as the "proportionality rule."<sup>74</sup> Intended to reduce "overdiscovery" and "redundant or

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will be achieved). Some commentators also favor dispensing with the trans-substantive principle for discovery and replacing it with a set of procedures that cover a wide range of cases that would then be supplemented by additional substance-specific protocols. *See supra* note 44 (explaining the need to supplement discovery rules with substantive-specific protocols to truly achieve proportionality). This combination of discovery practices would also provide policymaking restraint on judges' discovery decisions and address the institutional limits of the federal courts.

72. Judge Campbell Memorandum, *supra* note 13, at B-7, B-16 to B-19 (providing the text of the amended Committee Note, which traces the history of the proportionality factors in the discovery rules).

73. *Id.*

74. *Id.*; Singer, *supra* note 12, at 179.

disproportionate discovery” as well as “to encourage judges to be more aggressive in identifying and discouraging discovery overuse,”<sup>75</sup> the 1983 proportionality factors permitted courts to limit discovery upon determining that “the discovery [was] unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.”<sup>76</sup>

In an ensuing reorganization of Rule 26(b) in 1993, these proportionality factors were moved from Rule 26(b)(1) to Rule 26(b)(2)(C)(iii).<sup>77</sup> The 1993 amendments also added two new factors—“whether ‘the burden or expense of the proposed discovery outweighs its likely benefit’ and ‘the importance of the proposed discovery in resolving the issues.’”<sup>78</sup> Additionally, the 1993 Committee Note stressed the continued importance of proportionality in limiting discovery, providing that “the revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery.”<sup>79</sup>

By 2000, the Advisory Committee came to believe that courts were not using the proportionality “limitations” as contemplated<sup>80</sup> and added a sentence in Rule 26(b)(1) to alert litigators and courts to the existence of the proportionality factors and to highlight their importance in determining appropriate limits on discovery.<sup>81</sup> Despite these efforts, survey results of attorneys and judges shared at the 2010 Duke Civil Litigation Conference<sup>82</sup> led the Advisory Committee to

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75. Judge Campbell Memorandum, *supra* note 13, at B-7, B-37 to B-38.

76. FED. R. CIV. P. 26(b)(1) (1993) (amended 1993); *see also* Judge Campbell Memorandum, *supra* note 13, at B-37 (discussing the intent and substance of the 1983 provisions).

77. *Id.*

78. Judge Campbell Memorandum, *supra* note 13, at B-7.

79. *See id.* (discussing the 1993 revision of Rule 26(b)(2)).

80. *Id.*; *accord* Moss, *supra* note 62, at 905; Singer, *supra* note 12, at 180–88.

81. FED. R. CIV. P. 26(b)(1) (2000) (amended 2000) (adding the following text to Rule 26(b)(1): “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)”); *see also* Judge Campbell Memorandum, *supra* note 13, at B-7, B-19, B-39 (discussing the purpose of the 2000 Rule 26 amendment).

82. The Advisory Committee organized a Conference on Civil Litigation that was held at Duke University Law School and has come to be called the “Duke Conference.” The purpose of the conference was to seek “better means to achieve [Fed. R. Civ. P.]’s goal of just, speedy, and inexpensive determination of every action.” Judge Campbell Memorandum, *supra* note 13, at B-1 to B-2; *see also*

conclude that additional proportionality in discovery was needed and that returning the proportionality factors to Rule 26(b)(1) and making other amendments to Rule 26(b)(1) would improve discovery.<sup>83</sup> These survey results seem contrary to consistent empirical studies revealing that discovery is not disproportionately costly, except in a small percentage of high-value, complex cases.<sup>84</sup>

## 2. Proportionality as the Primary Constraint on Discoverable Matter

As noted above, the 2015 Rule Amendments return the proportionality factors to Rule 26(b)(1) and insert the factors as an element of the definition of the scope of discoverable matter in order

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Gensler & Rosenthal, *supra* note 33, at 645, 647–50 (discussing the goal of the Duke Conference). The Advisory Committee ultimately reported “near-unanimous agreement . . . that the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management.” Judge Campbell Memorandum, *supra* note 13, at B-2. The Advisory Committee ultimately created two subcommittees, including the “Duke Subcommittee” that was charged with considering recommendations resulting from the 2010 Duke Conference. *Id.* The Advisory Committee developed proposed amendments with the assistance of the Duke Subcommittee, which included (1) proposed numerical limits on discovery that were later withdrawn; (2) proposed amendments to Rule 26(b)(1); (3) recognition in Rule 26(c)(1) that “the allocation of expenses” may be included as a term of a protective order; (4) amendments to Rule 34 regarding “specificity” of objections to requests for production of documents or electronically stored information, a provision specifically permitting parties to produce copies of documents or ESI and a requirement that parties state whether they are withholding documents based on objections made; (5) a provision for early discovery requests; and (6) amendments to Rules 4 and 16 to permit earlier judicial case management. *Id.* at B-4 to B-14.

83. Judge Campbell Memorandum, *supra* note 13, B-6 to B-7. *See also* Gensler & Rosenthal, *supra* note 33, at 645–66 (concluding that the Duke Conference resulted in “clear and broad consensus,” based on complaints regarding the length and cost of cases, that procedure should be changed to “increase judicial engagement and supervision in the cases that need it, when it is needed”).

84. *See supra* note 12 (citing multiple sources of empirical research on the cost of discovery).

to increase proportionality and enhance judicial management.<sup>85</sup> Interestingly, neither the Rule text nor the Committee Note reference discovery costs or discovery abuse as a basis for making the proportionality factors a critical component of the scope of permissible discovery. Instead, the Committee Note indicates that proportionality itself has become the goal.<sup>86</sup> “Proportional” discovery, however, embraces two elements – (1) normative standards defining the desired balance between substantive justice and efficient and cost-effective discovery (or other procedural goals); and (2) a process for attaining the desired normative standards. The amendments to Rule 26(b)(1) do not articulate the normative standards for achieving proportional discovery, but provide only a process—the balancing of proportionality factors—for determining whether to permit discovery. Rule 26(b)(1), thus, requires parties and judges, in each case, to first make unguided value choices about whether to privilege substantive outcomes or less costly litigation (or other procedural goals) and then to use the results of that value determination to guide decisions regarding the extent of permissible discovery.

Under Rule 26(b)(1), the scope of permissible discovery will be measured by whether the material is relevant, non-privileged, and “proportional to the needs of the case,”—considering the following factors:

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85. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-8 (concluding, as part of the basis for returning the proportionality factors to Rule 26(b)(1), that “proportionality is an important and necessary feature of civil litigation in federal courts. . . . [but it] is still lacking in too many cases.”); *see also* Gensler & Rosenthal, *supra* note 33, at 647–48 (noting the general belief that the rules themselves are sound, but in practice, their application could be more consistent).

86. *See supra* notes 80–84, and accompanying text. The Advisory Committee Report dated June 14, 2014, emphasizes proportionality as the goal of discovery. *See* Judge Campbell Memorandum, *supra* note 13, at B-2 to B-3, B-5 to B-6 (indicating the conclusion in reports prepared for the Duke Conference: “[p]roportionality should be the most important principle applied to all discovery” and that three prior Advisory Committees had concluded that “proportionality is an important and necessary feature of civil litigation in federal courts”). The only suggestions that the purpose of proportionality standard is to control discovery costs or respond to discovery abuse appears in instances in which the Committee Note references or quotes prior Committee Notes that accompanied previous discovery Rule Amendments. *Id.* at B-37 to B-39, B-41.

- (1) the importance of the issues at stake in the action;
- (2) the amount in controversy;
- (3) the parties' relative access to relevant information;
- (4) the parties' resources;
- (5) the importance of the discovery in resolving the issues;  
and
- (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.<sup>87</sup>

Combined with other 2015 amendments to the scope-of-discovery provision,<sup>88</sup> Rule 26(b)(1) completes the elimination of the default discovery principle of broad and liberal discovery that was established with the adoption of the original Federal Rules. The amendment substitutes proportionality for substantive outcomes as the normative principle of highest priority, but neither the text of Rule 26(b)(1) nor the Committee Note supplies a normative default principle to govern the proportionality balance in most cases or even

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87. FED. R. CIV. P. 26(b)(1), *see* Judge Campbell Memorandum, *supra* note 13, at B-8. Rule 26(b) provides as follows:

**(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This amended language includes one new proportionality factor—"the parties' relevant access to relevant information." FED. R. CIV. P. 26(b)(1); *see* Judge Campbell Memorandum, *supra* note 13, at B-8.

88. *See infra* notes 113–126, and accompanying text.



a subset of cases. Thus, the definition of discoverable matter lacks the predictability that many conclude is vital to discovery.<sup>89</sup> It is possible to view the proportionality amendment and other 2015 Rule Amendments that slim the text of Rule 26(b)(1) and the scope of discovery as creating a default of less discovery.<sup>90</sup> The proportionality limits were certainly born of a conviction that their consistent application would limit discovery abuse and, thus, discovery costs.<sup>91</sup> They have been nurtured over the years by continued contentions that judicial case management, including judicially-set, case-specific discovery limits, would curb high discovery costs and discovery abuse.<sup>92</sup>

Nevertheless, neither the text of Rule 26(b)(1) nor the Committee Note supplies an explicit default to less discovery. To the contrary, the text provides factors that may tug toward either more or less discovery (or in both directions), given the context of the case. This explicitly remits the decision regarding breadth of discovery to trial courts (and, of course, to the negotiating strength of litigating parties) in particular cases. In this way, the proportionality standard invites district court judges to make normative decisions about the claims at issue. For example, in a given case, the first factor—“the importance of the issues at stake in the action”—may conflict with the second, “the amount in controversy.” A judge must determine whether the issues are important, and, if so, how important. The judge must then weigh that level of perceived importance against the amount in controversy, and, of course, must determine whether that amount is high, low, or somewhere in between. Opinions will differ. Indeed, the determination of the importance of the issue involves a judicial policy determination regarding the importance of particular

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89. See, e.g., Bone, *supra* note 26, at 918; (criticizing the management model for its failure to sufficiently defend the strength of trial judges’ procedure-making abilities); Subrin, *supra* note 2, at 89–90, 94 (discussing the importance to parties of predictability of discovery); Singer, *supra* note 12, at 181–84.

90. See *infra* notes 113–126, and accompanying text.

91. Judge Campbell Memorandum, *supra* note 13, at B-8. See also Singer, *supra* note 12, at 177–78 (discussing the goals associated with revising the proportionality factors from the Rules).

92. Judge Campbell Memorandum, *supra* note 13, at B-8; see also Burroughs, *supra* note 58, at 83–84 (noting that, except in a rare number of high stakes cases, discovery expenses are generally not excessively high).

substantive claims, and the weighing of issue “importance” against amount in controversy involves another value determination.<sup>93</sup>

Discussion of the potential conflict between these two factors in the 2015 Committee Note restates the “caution” of the 1983 Committee Note that “monetary stakes are only one factor” for courts to consider and underscores the substantive impact that scope-of-discovery decisions may have.<sup>94</sup> The 1983 Committee Note emphasized that, in addition to the monetary stakes at issue, judges must consider various other measures of issue importance:

[T]he significance of the substantive issues, [may be] measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters may have importance far beyond the monetary amount involved.<sup>95</sup>

The 2015 Committee Note adds to that caution, recognizing that “[m]any other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.”<sup>96</sup> Thus, the 2015 version of Rule 26(b)(1) and the 2015 Committee Note

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93. Judge Campbell Memorandum, *supra* note 13, at B-41 to B-42; see Burbank & Subrin, *supra* note 10, at 405–06 (emphasizing the “attack on democracy [that] results from [procedure that] undercut[s] the effectiveness of congressional statutes designed to compensate citizens for injury or to enable private enforcement of important social norms”); Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery* 16–17 (Univ. of Pa. Inst. For Law & Econ., Research Paper No. 15-1, 2014), available at <http://ssrn.com/abstract=2551520> (offering suggestions for judges in weighing relative factors); Moss, *supra* note 62, at 912–13 (suggesting that the “amount in controversy” and “importance of the issues” analysis are uncertain at the time of any decision under the proportionality rule); Singer, *supra* note 12, at 180–86 (noting that the unpredictability of proportionality determinations complicate the analysis of the utility of the proportionality rule); see also John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 464–66 (2010) (suggesting that proportionality is underutilized).

94. Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42.

95. *Id.* at B-41 to B-42.

96. *Id.*

suggest that, in cases involving “philosophic, social, or institutional” issues and in cases seeking to “vindicate vitally important personal or public values,” the importance of the issues at stake may outweigh the monetary stake and, presumably, other factors.<sup>97</sup> Neither, however, requires this balance for any particular substantive claim, ostensibly leaving the decision to the unguided discretion of each district court judge and the parties in each case, though these are the precise types of value judgments that vary by individual judge and on which the parties generally assume diametrically-opposed views.

The Rule or the Committee Note should have established normative guidelines, balancing priorities, or more helpful factors to prevent judges from encroaching on the substantive prerogatives of Congress or state policymakers. For instance, for cases in which Congress has created “statutory fee-shifting or damage-enhancement provisions,”<sup>98</sup> Congress has indicated a normative commitment to the substantive claim at issue and has indicated, moreover, that costs should not be the overriding consideration. The Rule text or Committee Note could have indicated, in these cases, that courts should default to permitting discovery of all non-privileged matter relevant to the claim or defense of any party (or to the subject matter of the claims in the action), thus, explicitly indicating a high level of deference to congressional policy determinations and removing the burden of the initial value choice before proportionality balancing.<sup>99</sup> Such a guideline would have left ample room for case-based discretion under proportionality balancing, but would have (1) relieved the federal district courts, which have limited substantive lawmaking authority, from having to make normative discovery decisions that could undermine congressional policy choices, and (2) facilitated

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97. Judge Campbell Memorandum, *supra* note 13, at B-41 to B-42.

98. See *supra* notes **Error! Bookmark not defined.** to **Error! Bookmark not defined.**, and accompanying text.

99. See Stephen B. Burbank, *Proportionality and the Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 654 (2015) (expressing concern that the 2015 Rule Amendments could lead to an emphasis of cost over benefits); Gelbach & Kobayashi, *supra* note 96, at 6; see also Subrin, *supra* note 12, at 400 (suggesting that drafters should consider parties’ time limitations); Burbank & Subrin, *supra* note 10, at 405–06, 411 (2011) (discussing Congress’s use of private enforcement actions to aid in enforcement of important social goals and recommending that such actions be exempted from any “simple track” procedural options that provide for lesser discovery).

increased uniformity for claims that Congress has identified as favored.

Further, even assuming that the importance-of-the-issues factor and the amount-in-controversy factor were aligned or were otherwise determined to favor broad or relatively broad (whatever that compromise might mean) discovery, courts might conclude that other factors listed in the Rule 26(b)(1) proportionality balance favor lesser discovery, such as the extent of “the parties’ resources,” the “importance of the discovery in resolving the issues,” or “whether the burden or expense of discovery outweighs its likely benefit.”<sup>100</sup> In fact, the importance of the discovery in resolving the issues would seem to be quite important in resolving proportionality issues. As is discussed below, however, complete information on this factor will be hard to obtain because, among other factors, parties often lack information early in the case and fail to realize the full importance of the information they do have. These additional factors may point in different directions in any single case. The 2015 Committee Note, however, sheds little light on the priority or weight to be accorded to these factors or on the situations in which each should be considered more highly.<sup>101</sup>

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100. FED. R. CIV. P. 26(b)(1).

101. With respect to the “extent of resources” factor, one would generally expect that discovery should be commensurate with resources under a proportionality principle, but the Committee Note hastens to provide also that discovery may be directed “to an impecunious” party and that discovery directed to “a wealthy party” would not be “unlimited.” Judge Campbell Memorandum, *supra* note 13, at B-42. With respect to the importance of the discovery in resolving issues in the case, the Committee Note indicates that the producing party may not have information about the importance of the discovery, but it does not address the very common circumstance in which a requesting party may not have a full appreciation of the uses for the discovery until he receives the discovery or until later in the case. *See id.* at B-42. Similarly, the Committee Note acknowledges, with respect to the burden or expense of discovery, that this information may not be available at the beginning of the case, and that the responding party may have the only information about this factor. *See id.* at B-40. But, the Committee Note makes no reference to the recognized inclination of parties to withhold information, especially before access to discovery can level the information playing field. *See infra* notes 140–141, and accompanying text.

The Committee Note does, by contrast, provide relatively clear guidance regarding the parties' "relative access to relevant information," a new factor that provides "explicit focus" on cases involving "information asymmetry."<sup>102</sup> The Committee Note indicates that in some cases, one party will have large amounts of information, while the other party has limited information.<sup>103</sup> The Committee Note acknowledges that some of the information may be easily accessed while some may be more difficult to access, and concludes simply that "these circumstances *often mean* that the burden of responding to discovery lies heavier on the party who has more information."<sup>104</sup> The Committee Note carefully leaves the decision for individual cases, but the clear import is that in most cases involving information asymmetry, the party lacking information should be permitted significant discovery.

Further hindering a district court in making the proportionality analysis are the following considerations: parties may have imperfect information regarding the factors, may not comprehend fully the import of the information in the initial stages of discovery, and will often evaluate each factor differently, arguing for contradictory conclusions on each factor.<sup>105</sup> The 2015 Committee Note, again, provides little direction on how to ameliorate these imbalances and differences, concluding, instead, that it will be "[t]he court's responsibility, using all the information provided by the parties, . . . to consider . . . all the . . . factors in reaching a case-specific determination of the appropriate scope of discovery"<sup>106</sup> and that the "burden or expense of proposed discovery should be determined in a realistic way."<sup>107</sup>

In short, the 2015 Committee Note is careful not to urge limited discovery or to premise the proportionality balance on an intent to curb either discovery abuse or excessive costs in discovery. Instead, it steadfastly remits decisions on discovery scope to a determination of proportionality in the context of each particular case.

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102. Judge Campbell Memorandum, *supra* note 13, at B-40.

103. *Id.*

104. *Id.* at B-40 to B-41 (emphasis added).

105. See Gelbach & Kobayashi, *supra* note 96 at 13 (recognizing that courts will have to make difficult judgment calls as to the assignment of weight for more subjective factors); see also *infra* notes 139–142, and accompanying text.

106. Judge Campbell Memorandum, *supra* note 13, at B-40.

107. *Id.* at B-42.

The benefit of the proportionality standard is that it permits district court judges to create reasonable, case-specific discovery boundaries. This coincides with Professor Subrin's observation that one discovery size does not fit all.<sup>108</sup> The disadvantages of the proportionality principle are (1) that it permits judges to privilege either the substantive claim at issue or fiscal factors over substantive interests; and (2) that, given the institutional limitations of the federal courts, which I discuss below,<sup>109</sup> district court judges may not be particularly good at making these case-specific determinations.

In summary, instead of serving as a means to an articulated procedural goal or value, "proportionality"—which privileges case-specific discretion—has itself become the goal of Rule 26(b)(1). Indeed, the Advisory Committee Report concludes that "[s]ince the [Duke] conference, the Committee and others have sought to promote cooperation, proportionality, and active judicial case management."<sup>110</sup> More emphatically, the Advisory Committee reported at the conclusion of the Duke Conference that "[p]roportionality should be the most important principle applied to all discovery."<sup>111</sup> Of course, cooperation, proportionality, and active case management may be goals in themselves. Conversely, they may be a means of achieving other desired objectives of litigation, such as efficient and cost-effective litigation in federal courts for the litigating parties, or sufficient evidence production to ensure that the proper party prevails. As used in support of procedural goals like these, the terms "cooperation," "proportionality," and "active case management" would provide some guidance.

When used as the goal itself, a requirement that discovery be "proportional" based on factors that may cut in different directions in different cases reduces, at best, to a requirement that discovery be reasonable, and, at worst, to unguided discretion to privilege cost considerations, substantive outcomes, or other procedural values.

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108. Subrin, *supra* note 12, at 378 (concluding that the trans-substantive discovery model should be "readjusted" and suggesting a "simpler procedural track for some cases and non-binding protocols for discovery and other procedural incidents for some of the more expansive and expensive case-types").

109. See *infra* notes 127–138 and accompanying text.

110. Judge Campbell Memorandum, *supra* note 13, at B-2 to B-3.

111. *Id.* at B-6.

Reasonable or “proportional” discovery is a worthy goal, but, unlike the clear discovery objective in the original Federal Rules,<sup>112</sup> it is not one that provides the parties or federal judges with an understanding of the guiding procedural values and, thus, of the conduct required or the types of orders that should issue in the varying types of claims filed in federal courts.

*B. The 2015 Amendments to Rule 26(b)(1)  
Eliminate Remaining Imprints of Liberal  
Discovery*

In addition to installing proportionality as the principal determinant of the scope of discovery, the 2015 amendments to Rule 26(b)(1) eliminate the remaining vestiges of the liberal discovery principle by removing or modifying three provisions of the former Rule 26(b)(1) that could support a continuing notion (in at least some instances) of a broad discovery default principle.

First, amended Rule 26(b)(1) removes the nonexclusive description of the type of information that is discoverable regarding “any party’s claim or defense.”<sup>113</sup> Former Rule 26(b)(1) provided, in part, as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.<sup>114</sup>

The italicized language above has been removed from the 2015 version of Rule 26(b)(1). The relevant portion of the 2015 Committee Note indicates that this excision removes textual material that has been rendered extraneous by common use and understanding, noting that discovery of this information is “so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule

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112. See *supra* notes 43–48, and accompanying text.

113. FED. R. CIV. P. 26(b)(1); see also Judge Campbell Memorandum, *supra* note 13, at B-42 to B-43.

114. FED. R. CIV. P. 26(b)(1) (2014) (emphasis added).

26 with these examples.”<sup>115</sup> Immediately thereafter, however, the Committee Note indicates a discovery-limiting effect of the amendment—the Note provides that discovery of this “deeply entrenched” matter “*should* still be permitted” when “relevant and proportional to the needs of the case.”<sup>116</sup> Thus, the removal of this language both makes discovery of this matter subject to the proportionality analysis and eliminates textual material courts might have relied on in determining whether discovery meets the new proportionality requirement. This amendment, again, underscores that proportionality is the key determinant of discoverable information and reinforces the perception that the text of Rule 26(b)(1) provides little guidance to judges in making the proportionality decision.<sup>117</sup>

Second, amended Rule 26(b)(1) likewise eliminates the “reasonably calculated” language, which currently provides that parties may discover information that “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>118</sup> The full provision states: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>119</sup> Amended Rule 26(b)(1) removes this “reasonably calculated” qualifier. The 2015 version of Rule 26(b)(1), as discussed above, requires that discoverable matter be relevant, non-privileged, *and* proportional to the needs of the case.<sup>120</sup> The Rule removes the ability to obtain material that “appears reasonably calculated to lead to the discovery of admissible evidence” and provides, instead, that information that is determined to be discoverable—i.e., that is relevant, non-privileged, and within the new scope of proportional discovery—“need not be admissible in evidence

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115. Judge Campbell Memorandum, *supra* note 13, at B-43.

116. *Id.* (emphasis added).

117. See Genetin, *supra* note 24, at 1119–20 (discussing, in the context of proposed amendment to Federal Rule of Civil Procedure 56 regarding summary judgment, that guidance in the text of the Federal Rules is important to consistent application of the Rules).

118. FED. R. CIV. P. 26(b)(1) (2014).

119. *Id.* This language was added to Rule 26(b)(1) in 1948. See FED. R. CIV. P. 26(b) 1948 advisory committee’s note.

120. See *supra* notes 85–87, and accompanying text.



to be discoverable.”<sup>121</sup> The first version of the “reasonably calculated” language was added to Rule 26(b) in 1946, with the stated purpose to “make clear the broad scope” of discovery.<sup>122</sup> The amendment, by contrast, reinforces restrictions on discoverable information.

Third, amended Rule 26(b)(1) eliminates textual Rule recognition of the ability of parties, upon a showing of good cause, to obtain discovery relevant to “the subject matter involved in the pending action,” thus limiting discovery to information that is relevant to “any party’s claim or defense.”<sup>123</sup> Although rarely invoked in the years since, discovery of material relevant to “subject matter” was removed from information automatically available for discovery,<sup>124</sup> this provision for obtaining “subject matter” discovery upon a showing of good cause was originally designed by the Advisory Committee “to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”<sup>125</sup> Retention of the parties’ ability to obtain discovery relevant to the subject matter of the action seems to fully support newly amended Rule 26(b)(1)’s increased emphasis on both case-responsive discovery and more active judicial management of the discovery process. Nevertheless, the Advisory Committee indicates that discovery of material relevant to the parties’ “claims and defenses” should be sufficient, “given a proper understanding of what is relevant to a claim or defense.”<sup>126</sup> The exclusion of “subject matter” discovery, thus, eliminates express textual authority to exercise discretion to extend discovery to meet the needs of a particular case, while the inclusion of the proportionality factors underscores textual authority to limit discovery.

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121. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-30 to B-31.

122. FED. R. CIV. P. 26(b)(1) (2014) & 1948 advisory committee’s note.

123. Prior to the amendment, Rule 26(b)(1) provided that “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” This language has been removed from Rule 26(b)(1). FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-30 to B-31.

124. See *supra* notes 62–64 and accompanying text.

125. Judge Campbell Memorandum, *supra* note 13, at B-9; see also Rowe, *supra* note 64, at 16–17.

126. *Id.* at B-43. See also Rowe, *supra* note 64, at 20–21, 24–27, 29–30 (concluding, shortly after promulgation of Rule amendments precluding “subject matter” discovery absent a motion and showing of good cause, that there was little evidence that the amendment had narrowed discovery appreciably and suggesting factors that might account for the limited impact).

In summary, the text of amended Rule 26(b)(1), with its adoption of a proportionality principle and its excision or restriction of other textual provisions, reveals that the transition away from the default of broad and liberal discovery in federal procedure is complete. Indeed, three amendments to Rule 26(b)(1) remove or revise language in the previous Rule 26(b)(1) and provide further evidence of discovery limits. It may be that the elephant in the Rule and Committee Note is an inclination toward—but not a default principle of—more limited discovery, a goal that has driven changes to the scope of Rule 26(b)(1) discovery provisions since 1983.

#### IV. PROPORTIONALITY AND THE INSTITUTIONAL CAPACITY OF FEDERAL COURTS

Absent meaningful direction in the text or Committee Note of Rule 26(b)(1),<sup>127</sup> a district court judge must engage in case-specific balancing of the factors set forth in the Rule. The rulemakers purposefully included a wide variety of factors that should be considered in crafting proportional discovery. They also declined, in both the Rule text and Committee Note, to provide significant guidelines regarding application of most of these factors.<sup>128</sup> This proportionality amendment might be optimal for decision makers who: (1) gather all information relevant to the scope of discovery decisions; (2) invite or require participation by the range of relevant stakeholders; (3) spend resources and time assessing results and comparing alternatives; and (4) make normative policy decisions regarding the substantive claims at issue. These characteristics, however, do not describe federal district court judges, magistrate

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127. Some judges would not consider Committee Notes, though the Supreme Court frequently references them. *See, e.g.*, Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141–42, 1152–69 (2002) (noting that proposed Committee Notes go through notice-and-comment review along with proposed Rule text, and advocating that material in the Committee Notes be accorded “authoritative weight” in interpreting Federal Rules).

128. *See infra* notes 151–160, and accompanying text, for an analysis of the guidance provided in the text of Rule 26(b)(1) and the Committee Note.

judges, or their assistants who resolve pretrial issues in particular cases.

Indeed, Professor David Marcus has recognized that trans-substantive, rather than case-specific, process law helps to “ameliorate[] . . . institutional limitations” of federal courts arising from limits on their “legitimacy, competency, and effectiveness” in creating substance-specific procedure.<sup>129</sup> Trans-substantive process law would include the textual and background principle of liberal discovery across cases, which was a premise of the original discovery rules and which supplied clear direction to judges making scope-of-discovery decisions. In the current litigation context, many accept that broad discovery in all cases is not optimal. Courts nevertheless require some guidance. Professor Robert Bone has concluded that when the Federal Rules delegate discretion to judges through multi-factor balancing tests, rulemakers should provide guidance by limiting the available factors, identifying principles that guide decision making, or both.<sup>130</sup> Such guidance would counterbalance the institutional impediments that district court judges will encounter in making case-specific, scope-of-discovery decisions using the multi-factor proportionality standard. In this Part, I briefly review the institutional impediments of federal courts that work to prevent good, case-specific decisions regarding proportional discovery, suggest means of ameliorating these institutional deficits, and conclude that Congress and the Advisory Committee are better suited, institutionally, to make these decisions.<sup>131</sup>

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129. Marcus, *supra* note 21, at 1220.

130. Bone, *supra* note 21, at 2015–16; Bone, *supra* note 18, at 300–03; *see also* Burbank, *supra* note 45, at 1473–74 (suggesting that courts should recognize that procedural rules are not neutral and should explicitly identify their impact).

131. *See generally infra* Section IV.A.1. *See also* Burbank & Subrin, *supra* note 10, at 412 (recommending that the Advisory Committee, in conjunction with plaintiffs’ and defendants’ attorneys, fashion discovery protocols for various substantive claims, and suggesting that the Advisory Committee probably has the authority to do so under the Rules Enabling Act and, if not, recommending that Congress should delegate that authority); *see also* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1194–1215 (2012) (comparing the institutional competencies of the Supreme Court in its adjudicatory capacity and in its rulemaking capacity and concluding that rulemaking is the superior policymaking tool in most circumstances because it is better suited to making policy, obtaining information, permitting broad participation, determining necessary tradeoffs, and

*A. Institutional Limits of District Courts*

1. Limited Normative Decision Making Authority

Federal district court judges have limited substantive lawmaking authority as compared to state lawmakers (including state courts) and their political counterparts at the federal level. When determining discovery scope under the proportionality analysis, however, district court judges will be required to make numerous normative judgments on a regular basis. As indicated above, the individual proportionality factors include elements requiring policy decisions, and the ultimate balance of individual factors will require additional normative trade-offs and value choices.<sup>132</sup>

The first and second factors are among the proportionality factors that will require normative decision making and will affect the parties' ability to succeed on different substantive claims.<sup>133</sup> The first factor requires a judge to determine the importance of the issues and will include normative line-drawing regarding the importance of the issue to the parties and society. The second factor requires the judge to determine importance based on the monetary value of the claim at issue, which also requires a judge to set value-based boundaries.

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creating comprehensive solutions); Struve, *supra* note 130, at 1141–42, 1152–69 (noting that proposed Committee Notes go through notice-and-comment review along with proposed Rule text and advocating that material in the Committee Notes be accorded “authoritative weight” in interpreting Federal Rules).

132. See *supra* notes 93–101, and accompanying text; see also Burbank, *supra* note 99, at 650–51; Gelbach & Kobayashi, *supra* note 96, at 12–18; Moss, *supra* note 62, at 896 (in making the proportionality calculation, judges must consider both value to the parties and to society).

133. See generally *supra* Section III.A.2. Additionally, even assuming that the judge could obtain adequate information to determine an issue's importance to both the parties and society, (which I explore below—see *infra* notes 142–145) judicial policymaking will not end with the judge's determination of the issue's importance, but will recur as the judge makes further decisions essential to the proportionality decision, including whether the amount in controversy (factor 2) outweighs the issue's importance; the extent of discovery to provide parties (often plaintiffs) in instances of “information asymmetry” (factor 3); whether the parties' resources (factor 4) justify more or less discovery; and whether the burden or expense of discovery (factor 6) outweighs its likely benefit.

Other factors, too, will require normative decision making. Factor three, for example, which assesses the extent of parties' access to relevant information and focuses on cases of information asymmetry, will inevitably involve a trade-off between one party's (typically, the plaintiff's) ability to obtain sufficient discovery to prove a claim and the opposition's discovery costs. These factors implicate the limited lawmaking authority of district court judges.

The decisions may, at the same time, encroach on the substantive policy choices of Congress or the states to use private adjudication (often in conjunction with administrative enforcement) to enforce substantive policy.<sup>134</sup> For example, Congress has created private attorney general provisions in many statutes and has also induced suit through attorney fee provisions and enhanced damages awards.<sup>135</sup> These provisions represent Congress's determination that the social benefit of enforcing the claim at issue exceeds the private benefit and cost of litigation for the individual parties.<sup>136</sup> Judicial decisions to limit discovery in these cases could encroach on both the policy decisions of Congress and the civil enforcement methods

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134. See e.g., Burbank & Farhang, *supra* note 45, at 1545, 1547–50 (“[T]he choice of private over administrative enforcement may afford protection to congressional policy long after the governing majority has been replaced by legislators with different preferences.”); Burbank, Farhang, & Kritzer, *supra* note 12, at 640, 644–47 (providing historical background of the increase in federal statutory and administrative law and observing that the increase coincided with “the federal government’s reliance on private enforcement”).

135. See e.g., Subrin, *supra* note 12, at 395–97 (arguing that trans-substantive procedures are not the best fit for the United States); Burbank, Farhang & Kritzer *supra* note 12, at 640 (concluding that “the desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors” and that “[m]aking such determinations therefore requires familiarity with the nature of the particular policy problem, the substantive goals of the regulatory scheme, and the likely interaction of private lawsuits with other elements of the government’s enforcement strategy”).

136. See, e.g., Gelbach & Kobayashi, *supra* note 96, at 3 (asserting that courts determining the proportionality of discovery should consider “the divergence between social and private benefits of discovery, e.g., in litigation with important precedential or social value that will not be internalized by the litigants”); Burbank, *supra* note 99, at 651 (concluding that one of the social benefits of private enforcement, pursuant to congressional legislation, is the avoidance of the huge “expenditures, higher taxes, and bureaucratic state-building that are essential to adequate public enforcement.”).

selected by Congress.<sup>137</sup> Commentators emphasize, moreover, that congressional decisions to pursue substantive goals through private enforcement often include concurrent decisions not to fund alternative public means of enforcing the claims through increased taxes.<sup>138</sup>

Consequently, when making proportionality decisions, district courts must calculate and weigh the private and social benefits and costs. These calculations will not be easy to make in the context of particular cases; the decisions could involve decisions contrary to those of Congress and state policymakers; and such decisions will often require information that will be unavailable to the parties and the judge.

## 2. Lack of Access to Information

Judges, who must rely to a large extent on information from the parties, will often lack access to the information necessary to make informed decisions when implementing the proportionality standard.<sup>139</sup> The litigation process thus compares less favorably to

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137. See, e.g., Bone, *supra* note 26, at 927 (discussing the limitations of case-specific rule-making); Burbank, Farhang & Kritzer, *supra* note 12, at 648 (indicating that “those with the power to determine the efficacy of private enforcement regimes in action may subvert the policy preferences of the enacting Congress”); Moss, *supra* note 62, at 896; Subrin, *supra* note 12, at 395–97 (concluding that “[c]alibration of discovery is calibration of the level of enforcement of the social policy set by Congress” (quoting Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997))).

138. See, e.g., Burbank, *supra* note 99, at 651–52; Burbank & Farhang, *supra* note 45, at 1547–49; Carrington, *supra* note 9, at 603–06 (concluding that “[a] nation that often eschews the idea of strong or intrusive government may require [statutorily granted suits by private citizens]. . . to constrain harmful business practices”); Subrin, *supra* note 12, at 387, 396–97.

139. See Bone, *supra* note 21, at 1986–2001 (discussing “bounded rationality constraints, information access obstacles, and strategic interaction effects” as obstacles to a district court judge’s effective “exercise of discretion”); Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006) (registering skepticism about delegating broad discretion to district court judges, based on doubts that judges “can gather and process the information necessary to craft case-specific procedures that produce good outcomes in the highly strategic environment of litigation”); Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 537, 561 (2009) (concluding that the Supreme Court, in the context of judicial interpretation, “is ill

other institutions that have broader authority to request or require provision of information, such as Congress and the federal rulemakers acting under the Rules Enabling Act.

Further, parties themselves often lack complete information in the context of litigating particular cases, thus limiting the judge's ability to make sound normative decisions. Additionally, parties have incentives to withhold information,<sup>140</sup> further limiting the information available to the judge when making complex determinations under the proportionality standard. Moreover, parties will benefit most from withholding information early in the case and before the opposing party has the ability to obtain that information through discovery.<sup>141</sup> This is precisely the time that the judge formulates his or her initial views and makes case management and discovery decisions that often dictate the case's course. Indeed, because the 2015 amendments to the Federal Rules also encourage earlier sharing of information and earlier judicial case management, incentives to withhold information early in the case could be intensified. In addition, early discovery decisions made on the incomplete information available to the judge will impact later stages of the litigation, including the strength of the parties' positions at settlement, summary judgment, and trial.<sup>142</sup>

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equipped to gather the range of empirical data, and lacks the practical experience . . . that [is] implicated in considering standards for the adequacy of pleadings"); Marcus, *supra* note 21, at 1222–1233 (reviewing trans-substantivity and judicial upkeep or process law); Singer, *supra* note 12, at 183 (discussing the institutional limitations that prevent courts from “legitimately, competently, and effectively designing substance-specific process law”).

140. See Bone, *supra* note 21, at 1990–91, 1993 (noting that withholding information is advantageous to parties because it both requires other parties to incur costs in obtaining the information and it prolongs any existing information asymmetry); Gelbach & Kobayashi, *supra* note 96, at 14–15 (noting, regarding the access to information factor, that it may be difficult for judges to gauge the extent of the producing party's access to information and that requesting parties will have incentives to understate ability to obtain information or to exaggerate the costs of obtaining it).

141. Bone, *supra* note 21, at 1990; Moss, *supra* note 62, at 896.

142. Bone, *supra* note 21, at 1993; Bone, *supra* note 26, at 927; see also Moss, *supra* note 62, at 910–12 (concluding that court decisions regarding proportionality are “doomed to be suboptimal” because, *inter alia*, in applying the proportionality standard, courts must consider the probative value of evidence, the size of the case, and the likelihood that plaintiff will prevail at trial, but courts cannot make a good evaluation of the likelihood of success at trial until they obtain the evidence at issue).

Moreover, some information crucial to making a good decision under the proportionality standard will not be in the possession of the parties. This includes information regarding the social costs and benefits of claims created by Congress and other decision makers. For this type of information, it could be crucial to obtain participation of other stakeholders, but litigation provides few opportunities to invite or require broad participation.

Even if judges could obtain complete information, however, they would still suffer from a comparative inability to conduct empirical assessment of the information, compare their discovery limits to other alternatives, and use that information to inform ultimate proportionality decisions.<sup>143</sup> Absent sufficient time, information, and resources to assess the information empirically, judges will likely resort to schemas and heuristics that introduce bias into their decision making.<sup>144</sup> Moreover, because a single judge acts as the decision maker in trials, there are not structural checks and balances that could lessen the effect of bias.<sup>145</sup>

Finally, case-specific application of the proportionality standard will require enormous costs in terms of judicial time and effort for results that, given information access and assessment limitations, will not be optimal and will result in disuniformity of discovery procedure across the federal system.

### 3. Little Opportunity for Meaningful Appellate Review

The nature of appellate review in federal courts will also ensure little opportunity for meaningful review of district court decisions implementing the proportionality standard. Appellate review generally supplies corrective oversight and instruction regarding controlling legal principles. Additionally, for issues subject

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143. Marcus, *supra* note 21, at 1230; *see also* Bone, *supra* note 21, at 1986–87 (discussing the issues broad discretion creates).

144. Bone, *supra* note 18, at 301, 307–08; Bone, *supra* note 21, at 1987–90; Marcus, *supra* note 21, at 1230.

145. Bone, *supra* note 21, at 1989–90; Marcus, *supra* note 21, at 1231.



to an abuse of discretion standard, appellate review may, over time, provide guidance by narrowing the scope of permissible discretion.<sup>146</sup>

The appellate court's ability to provide error correction and guidance regarding the application of the proportionality standard in discovery rulings, however, will be diminished. First, review will often not be available. Discovery issues, which are rarely subject to immediate appeal, will often fade in importance as the case progresses and will not be appealed. Second, many cases settle, precluding appeal of even important proportionality issues. Third, even if a case is appealed on the application of the proportionality standard, the district court's proportionality decision will typically be reviewed under the abuse of discretion standard, which triggers the appellate court's substantial deference to the district court's determinations. These general constraints will limit the opportunity for appellate courts to compare various proportionality decisions from the laboratory of the district courts, to identify stronger decisions, and to impose a level of consistency or uniformity in proportionality decisions.

Moreover, in the event that a party successfully appeals a proportionality standard issue, the appellate court's review will be limited by the district court's record. That is, the reviewing court's decision will be impacted by the following limitations on the district court: lack of access to complete information, parties' incentives to withhold information, and inadequate resources to assess the information provided. These constraints will, in turn, impede the ability of appellate courts to provide corrective review or guidance regarding proportionality issues. Finally, federal appellate courts, like district courts, have limited substantive lawmaking ability. Thus, appellate decisions, like district court decisions, may encroach upon the substantive policy decisions of Congress or other decision makers.

#### *B. Moving Forward with Proportionality*

Notwithstanding the institutional obstacles that district courts and other decision makers will confront in applying the proportionality standard, courts will need to apply the standard regularly. In this Part, I conclude that in the short term, district courts should defer to the pre-existing policy choices of Congress and other

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146. Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1568 (2003).

decision makers regarding substantive claims and to the limited guidance in Rule 26(b)(1) and in the Committee Note. In the long term, the Advisory Committee should reclaim the issue of proportionality in discovery and provide guidance by creating general discovery procedures to cover the broad run of cases and substance-specific protocols to govern specific substantive claims.

In the short term, district courts should conclude that their discretion in creating discovery that is proportionate to the substantive claims at issue is limited. Courts should resolve proportionality issues against the backdrop of the values underlying the applicable substantive law and in light of the values furthered by the judicial system. Though the American judicial system promotes many values, one of the most important is the goal of resolving cases in accord with the substantive rights of the parties.<sup>147</sup> Thus, in implementing the proportionality standard, courts should determine and enforce the policy objectives of Congress and other lawmakers. The choices of other decision makers will not provide definitive guidance regarding resolution of all discovery disputes, but they will provide background principles to guide decisions in some segments of cases. Moreover, furthering the existing normative choices of Congress and other decision makers when making proportionality decisions parallels the federal courts' role, when adjudicating disputes, of enforcing the values underlying authoritative texts or otherwise existing in practice.<sup>148</sup> District courts, thus, should make discovery decisions that do not undermine the value choices in existing substantive law.

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147. *E.g.*, Bone, *supra* note 18, at 302; Bone, *supra* note 26, at 913–14.

148. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (concluding that the role of judges and other court decision makers “is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”); *accord* Bone, *supra* note 18, at 302–03 (“[P]rivate dispute resolution is not the primary goal of procedure under any sensible account of American civil adjudication. . . . It is meant to enforce the substantive law, and the substantive law is meant to further public goals such as deterring socially undesirable behavior and providing morally justified compensation.”); *see also* Bone, *supra* note 26, at 940–43, 949 (concluding that both a “rights-based metric” and a “process-based metric” for determining procedural issues would support the argument that procedural rulemakers should make procedural choices by referring to existing practice of

Adherence to normative preferences of other policymakers is also consistent with the Advisory Committee's statement that, in the "importance of the issue" factor, the district courts should consider "philosophic, social, or institutional" concerns and that some substantive claims will "vindicate vitally important personal or public values."<sup>149</sup> But there is a caveat. It would require judges to promote the existing protections for substantive claims,<sup>150</sup> rather than to substitute their own normative choices. It would also require judges to determine, to the extent possible, how those substantive preferences play into the necessary cost-benefit analysis of the proportionality standard and, further, how those preferences may guide on-the-ground discovery disputes such as the number of permissible depositions, scope of permissible document requests, and sequence of discovery.

District courts should also consider any guidance provided in the text of the Rule or Advisory Committee Notes.<sup>151</sup> The text of Rule 26(b)(1), as discussed above, provides little direct guidance. The rulemakers did, however, place the "importance of the issues" factor first, to underscore the importance of that factor and to prevent any conclusion that the amount in controversy was the most important factor.<sup>152</sup> The Committee Note similarly emphasizes the "significance

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protection for substantive values, and concluding that court-based, committee-centered rulemakers would fare better at the exercise than judges exercising discretion in the context of particular cases); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 735 (1975); Marcus, *supra* note 21, at 1238–39 (positing that courts might vary from a trans-substantive standard to create substance-specific procedure if the more specific rule would support "the policy objectives . . . of an antecedent regime").

149. Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42; *see also supra* notes 94–99, and accompanying text.

150. Bone, *supra* note 142, at 1162. *See also* Bone, *supra* note 26, at 935–37, 951–52 (concluding that in measuring outcome, in a rights-based court-rulemaking model, the procedural rulemakers should "construct from existing practice a coherent general theory of value that fits and justifies the pattern of protection given to interests by the legal system as a whole"); Marcus, *supra* note 21, at 1228–30 (indicating that when judges make substance-specific procedure, they should do so to support policies in existing law, i.e., to support "an antecedent regime's policy objectives," in order to avoid establishing their own policy preferences and exceeding their lawmaking authority).

151. Struve, *supra* note 130, at 1141–42, 1152–69.

152. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42 (internal quotations omitted).

of the substantive issues.”<sup>153</sup> Here, the Advisory Committee recognized that “many cases in public policy spheres, such as employment practices, free speech, and other matters may have importance far beyond the monetary amount involved” and that a number of other substantive areas may present cases seeking little or nothing of monetary value.<sup>154</sup> The Committee Note, thus, may be read to imply that the courts are not to make their own value choices, but are to promote the value choices in existing law.

Additionally, the Committee Note reveals little purpose to reduce discovery costs through proportionality, but instead proposes to seek greater coincidence between claims and discovery.<sup>155</sup> Likewise, consistent empirical evidence reveals that discovery costs are not excessive except in a small set of complex cases.<sup>156</sup> The lack of purpose to address radical imbalances in discovery costs also supports the notion that district courts should seek to further substantive policy choices of superior normative decision makers. Acting at the boundaries of their lawmaking authority and without evidence of excessive discovery costs in the majority of cases, district courts should exercise restraint in limiting discovery in areas where Congress or other policymakers have created favored claims.

The text of Rule 26(b)(1) and the Committee Note also provides some guidance regarding cases involving “information asymmetry.”<sup>157</sup> Rule 26(b)(1) includes a new factor—“the parties’ relative access to relevant information.”<sup>158</sup> This factor was included to highlight the issue where “[o]ne party—often an individual plaintiff—may have very little discoverable information,” while the opposing party may have a substantial amount of information.<sup>159</sup> In these circumstances, the Committee Note advises courts that, “the

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153. Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42 (internal quotations omitted).

154. *Id.* at B-41 to B-42.

155. *Id.*

156. *Id.* at B-6 to B-7.

157. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-40.

158. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-30.

159. Judge Campbell Memorandum, *supra* note 13, at B-40 to B-46.

burden of responding to discovery [will] lie[] heavier” on the party with more information in most cases.<sup>160</sup> District courts should follow this guidance.

In addition to deferring to existing substantive policy choices and to guidance in the Rule and Committee Note, courts should provide rulings that make clear the rationale of their proportionality decisions. Articulating the reasons underlying proportionality decisions will serve several purposes. First, since lawmaking is commonly incremental, clarity regarding the basis for opinions will permit the development of a body of law regarding proper interpretation and application of the proportionality factors, which may be critical given the likely lack of appellate guidance. Thus, district courts may, given the narrow opportunity for review of discovery issues, be critical actors in creating the law governing proportionality in discovery and in developing principles from which the Advisory Committee may be able to craft more helpful normative guidelines, create more helpful balancing factors, and provide clarity regarding priority of balancing factors. Second, decisions that clearly indicate the bases for proportionality rulings would also provide a body of law for appellate courts to consider in the limited circumstances in which proportionality issues reach appellate review. Third, transparency of the rationale for proportionality decisions would help ensure that the district judges obtain the best information possible and rely on that information, rather than resorting to judicial intuition, heuristics, and schemas.<sup>161</sup> Fourth, providing the reasoning underlying decisions would also help ensure that district courts adhere to the existing policy choices of superior policymakers, rather than substituting their own choices. Explicit rationale for proportionality decisions would, thus, enhance the legitimacy of courts’ proportionality decisions. Indeed, in other instances in which district courts act at the boundaries of their authority—such as Rule 56, regarding summary judgment; Rule 65, regarding injunctions; and Rule 23, regarding class action certification—procedural rules have

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160. Judge Campbell Memorandum, *supra* note 13, at B-41.

161. See Bone, *supra* note 21, at 1986–90 (explaining obstacles to effective exercise of procedural discretion).

required or practice has provided more transparent decision making.<sup>162</sup>

Fifth, a primary justification for court-made procedural rulemaking under the Rules Enabling Act, despite its inevitable impact on substantive rights, is its foundation in reasoned deliberation.<sup>163</sup> To the extent the proportionality standard substitutes case-specific judicial discretion regarding proportionality for committee-based, predetermined discovery standards,<sup>164</sup> court opinions, too, should reveal the grounds for the decisions. Indeed, commentators have suggested that even the Supreme Court, as Congress's expressly delegated rule maker, should pay close attention to existing law when promulgating rules and should provide a clear statement of the

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162. See Marcus, *supra* note 21, at 1241 (suggesting that rules promote reasoned deliberation); accord Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 981–82 (2010) (indicating that the judge's explicit reasoning regarding the "process, the inputs, and the challenges" in ruling on a motion for an injunction as well as on each required factor for the injunction permits judicial flexibility, but also provides an "effective constraint on individual judgment in decisionmaking"); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 651–56 (1995). See FED. R. CIV. P. 52(a)(1). Accord Adamson, *supra* note 26, at 1045 (noting that FED. R. CIV. P. 52(a)(1), which requires district courts to issue findings of fact and conclusions of law in actions tried without a jury or with an advisory jury and for interlocutory injunctions, reinforces the trial court's superiority in finding facts and the appellate court's superiority in norm declaration and norm elaboration). See also FED. R. CIV. P. 23(c)(1) (requiring that a court must "determine by order whether to certify the action as a class action" and specifying that the order must "define the class, the class claims, issues, or defenses, and appoint class counsel"); FED. R. CIV. P. 56(a) (amended in 2010 to include a new directive that the court "should state on the record the reasons for granting or denying" a motion for summary judgment, which the accompanying Committee Note indicated accorded with practice already implemented by most courts).

163. See Bone, *supra* note 26, at 940–41, 951–52 (suggesting that rulemakers creating rules through the rulemaking process should use reasoned deliberation to create Rules that promote a set of legal principles that do not "deviate too much from existing practice"); Bone, *supra* note 142, at 1160–63; Cover, *supra* note 151, at 734–36; Mulligan & Staszewski, *supra* note 134, at 1246–51; Struve, *supra* note 130, at 1110–14.

164. Bone, *supra* note 26, at 917–18, 926–29, 951–52; see also Struve, *supra* note 130, at 1119–20, 1120 n.72 (suggesting that district courts should have less discretion to interpret rules).

grounds for its procedural rulemaking choices.<sup>165</sup> The rule makers' articulation of reasoning is critical to compliance with the Rules Enabling Act, which provides that rules enacted pursuant to the Act "shall not abridge, enlarge, or modify any substantive right."<sup>166</sup> Reasoned decision making assists in legitimizing the federal rule makers' procedural choices and rule makers' discretion because it reveals their substantive choices, reveals the extent to which rulemakers adhered to existing normative decisions of Congress, and permits Congress to change the procedural choices in particular cases if it deems change necessary.<sup>167</sup> Because the Advisory Committee has declined, in Rule 26(b)(1), to make normative choices and has instead delegated those choices to district courts, the district courts should justify their case-specific choices under the proportionality standard by articulating the reasons for their proportionality decisions.

Further, because appellate review will be relatively rare, it might also be beneficial for district courts to flag their proportionality decisions for study by the Federal Judicial Center and other commentators. Such a study could provide the legitimacy-enhancing benefits discussed above while also helping to provide a measure of uniformity and systemic coherence—two procedural values that are sacrificed when rule makers authorize case-specific discretion.

In the long term, however, the Advisory Committee should return to the issue of proportional discovery and should provide additional guidance regarding application of the proportionality factors or should create (1) uniform general discovery standards for most cases and (2) substance-specific discovery protocols for recurring substantive claims that often present difficult discovery issues.<sup>168</sup> Indeed, the Federal Judicial Center's October 2015 report

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165. Bone, *supra* note 26, at 950–52; Bone, *supra* note 142, at 1159; Cover, *supra* note 151, at 734–40; Mulligan & Staszewski, *supra* note 134, at 1247–51.

166. 28 U.S.C. § 2072(b) (2012).

167. Bone, *supra* note 26, at 950–51; Bone, *supra* note 142, at 1157–59; Cover, *supra* note 151, at 734–36.

168. See, e.g., Burbank & Subrin, *supra* note 10, at 409–12 (suggesting a "simple case" track with limited discovery for cases under a certain dollar amount, with little opportunity for litigants to alter the limits by agreement or court order, which would be supplemented by substance-specific protocols for case types that engender burdensome discovery); Subrin, *supra* note 1, at 28–29, 45–56; Subrin, *supra* note 12, at 399–405; see also Bone, *supra* note 21, at 1994–96 (contending that general discovery rules and substance-specific discovery protocols, which provide discretion for trial courts to vary from the established norms in special cases,

on the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action provides support for further exploration of pattern discovery protocols.<sup>169</sup> The Advisory Committee, acting in concert with plaintiffs' attorneys, defendants' attorneys, and other relevant stakeholders, would enjoy institutional advantages unavailable to district court judges acting in the context of particular cases. Through the rulemaking process of the Rules Enabling Act,<sup>170</sup> the Advisory Committee, which is composed of a range of lawyers and judges,<sup>171</sup> can and does invite broad participation in rulemaking activities. It gives notice of proposed rules, provides opportunity for comment on rule proposals, and holds public hearings.<sup>172</sup> The Advisory Committee may also obtain empirical assessments in support of proposed rules, and its proposed rules are subject to multiple layers of review.<sup>173</sup>

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would be superior to delegating case-specific discretion to judges); Gensler & Rosenthal, *supra* note 33, at 650–51, 654–57 (supporting proportionality balancing but suggesting supplementation by use of “scheme-based” protocols).

169. Emery G. Lee III and Jason A. Cantone, FEDERAL JUDICIAL CENTER, REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 1 (2015) (comparing cases by federal judges who voluntarily adopted the discovery protocols and those who did not and concluding, *inter alia*, (1) motions to dismiss and for summary judgment were “less likely to be filed” in cases under the protocols; (2) the average number of discovery motions filed in cases under the protocols was about half that of the comparison cases; (3) it appeared that cases under the protocols were more likely to settle but the time to settlement was not faster; and (4) there was “no statistically significant difference in case processing times” between the two sets of cases).

170. 28 U.S.C. §§ 2072–2074 (2012).

171. 28 U.S.C. § 2073(a)(2) (2012).

172. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1672 (1995).

173. The Judicial Conference, which is assisted by a Standing Committee and five advisory committees, including the Advisory Committee on the Federal Rules of Civil Procedure, takes the lead in the Rule amendment process. Proposed rules are considered first by the appropriate advisory committee and are, thereafter, sent to the Standing Committee. If approved by the Standing Committee, the proposed Rule is sent to the Judicial Conference for approval. The Judicial Conference transmits approved rules to the Supreme Court, which has seven months to review and transmit the Rule to Congress. Congress then has seven months in which to delay, amend, or veto the proposals. Absent such action by Congress, a proposed Rule takes effect. *See Struve, supra* note 130, at 1103–19, 1140 (suggesting that



The rulemaking process, therefore, provides better access to information, greater resources to aid in empirical assessment of information obtained, broader participation by relevant members of the legal community and public, and multiple tiers of review. General discovery limits and substance-specific discovery protocols created through this rulemaking process would provide ample room for judicial discretion but would also provide for better, more-informed rules, sharpened guidance to district court judges, and heightened uniformity across the federal system. Such rulemaking, though creating some substance-specific procedural rules, is likely within the Court's rulemaking authority under the Rules Enabling Act.<sup>174</sup> If it is not within the Court's authority, however, commentators have pragmatically suggested that Congress could either amend the Rules Enabling Act to confer such authority, or it could directly enact the proposed rules.<sup>175</sup>

## V. CONCLUSION

The 2015 amendments to Rule 26(b)(1) install largely unguided proportionality balancing as the primary determinant of discoverable information in the federal courts and also eliminate textual provisions that favored broader discovery. The text of the 2015 amendment to Rule 26(b)(1) and the text of the Committee Note provide some minimal guidance regarding the importance of the proportionality factors, their weight, and their application, but the Rule, in the main, remits these decisions to the parties and the district

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rulemaking provides for greater deliberation than adjudication); *see also* Genetin, *supra* note 35, at 689–90 (providing background of Rules Enabling Act).

174. *See, e.g.*, Bone, *supra* note 142, at 1159–60 (emphasizing that Professor Cover's "deeper point" was that sometimes the justification for a procedural choice "necessarily ha[s] to take account of substantive policies, and in such cases, judges should explain their choices publicly and make the connection to substantive policy explicit"); Bone, *supra* note 26, at 950–53 (discussing limits of court rulemaking); Burbank, *supra* note 35, at 1124–25, 1193 (proposing that, ironically, changes to rulemaking advanced under the Rules Enabling Act should come through administrative law); Cover, *supra* note 151, at 734–36. *But see*, Joshua M. Koppel, Comment, *Tailoring Discovery: Using Non Trans-substantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 285–87 (2012) (questioning the Supreme Court's authority to promulgate substance-specific discovery rules and also concluding that Congress is, as an institutional matter, better-suited to the task).

175. Burbank & Subrin, *supra* note 10, at 412.

court judge or magistrate judge in the context of particular (perhaps idiosyncratic) litigation. Although the proportionality standard permits district courts to establish discovery that meets the needs of each case, district courts face institutional challenges in creating case-specific procedure that trump the supposed benefits of determining proportionality through case-specific balancing of listed factors.

Aiming for the outside corner of federal court authority, the amendments came in wide of the mark. District court decision makers are at a comparative disadvantage vis-à-vis the political branches and the Advisory Committee in such endeavors because they have a narrower range of lawmaking authority, have little ability to obtain broad-based information or broad participation of relevant stakeholders, and have limited resources to devote to evaluating information, making normative predictions about future events, and creating policy. Further, appellate courts will rarely review discovery decisions. When they do, they too will be hindered by initial failures of access to information by the district court and by lack of policymaking authority.

I, thus, recommend that district courts promote, to the extent possible, the normative preferences of Congress and other policymakers, and defer to the admittedly limited guidance available in the text of Rule 26(b)(1) and the Committee Note. I recommend as well that district court decision makers articulate the reasons underlying their proportionality decisions. I also join the chorus of those suggesting that application of proportionality in discovery would be better achieved by the Advisory Committee's promulgating discovery principles applicable to most cases and substance-specific protocols uniformly applicable to particular substantive claims. If the discovery zone is to be narrowed for some players in the litigation game, rulemakers who can invite broad participation, access comprehensive information, and obtain sophisticated assessment of the information, should make those decisions on a system-wide basis.